A **KGV & Associates Sdn Bhd v The Co-Operative Central Bank Ltd**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–621 OF 2001

B GOPAL SRI RAM, MOHD GHAZALI AND ZULKEFLI JJCA
27 JULY 2006

C *Tort — Negligence — Professional negligence — Property valuers — Duty of care — Whether commissioned by plaintiff — Whether there was evidence to show that defendant permitted report to be used by third party — Whether proximity and policy conditions satisfied — Whether there is assumption of responsibility by defendant*

D The defendant prepared a valuation report and addressed it to one Tan Liew Lin ('Tan'). Among others, the report makes the following points. First, that it was being prepared on the instructions of Tan to advise on the present fair market value of the subject property for financing purpose. Second, that defendant had inspected the subject property which was a lot of land on which a double storey terrace shop-house E was being built with about 70% of the construction complete. Third, that the fair market value of the subject property is RM408,000. Fourth, it disclaims responsibility to a third party in the absence of the defendant's prior knowledge and consent. Tan took the report to the plaintiff's office. He was accompanied by one Kong Siew Kan ('Kong'). According to Tan, it was Kong who was the real borrower. F Tan was merely assisting Kong as a friend. It was clear that the report was not being used by Tan but by Kong. Later, by two letters, the plaintiff confirmed the grant of two separate loans of RM100,000 each to Kong. The loans went bad because Kong defaulted. The plaintiff then discovered that the market value of the subject property was only RM51,000. This produced a shortfall of RM150,620.46 (inclusive of G interest as at the date of the filing of the action) which sum the plaintiff claimed in its writ against the defendant. The learned trial judge gave judgment for the plaintiff.

Held, allowing the appeal:

H (1) Whilst there are several useful tests, indicia or guidelines to ascertain whether a duty of care exists in given circumstances, the ultimate question whether a duty of care should be in a particular case is essentially fact sensitive (see para 10).

I (2) The report was not commissioned by the plaintiff. It was commissioned by Tan. But he was not the true borrower. Kong was the true borrower. There was no evidence to show that the defendant knew the report it gave Tan would be used by Kong. The plaintiff having seen the report did not want it because it was not addressed to Kong. There was no evidence to show that the defendant permitted Kong to use the report after the plaintiff had rejected it (see para 13).

(3) There had been no assumption of responsibility by the defendant. The proximity and policy conditions of the threefold test have not been satisfied (see para 13).

[Bahasa Malaysia summary

Defendan telah menyediakan laporan penilaian dan mengemukakannya kepada Tan Liew Lin ('Tan'). Antara lain, laporan itu telah mengemukakan beberapa perkara. Pertama, bahawa ia telah disediakan atas arahan Tan untuk menasihat tentang nilai pasaran hartanah yang wajar untuk tujuan pembiayaian. Kedua, bahawa defendan memeriksa hartanah tersebut yang merupakan lot tanah di mana rumah kedai teres dua tingkat yang dibina dan hampir 70% siap. Ketiga, bahawa nilai pasaran hartanah yang wajar adalah RM408,000. Keempat, ia menafikan tanggungjawab kepada pihak ketiga dalam ketiadaan pengetahuan dan persetujuan defendan sebelumnya. Tan mengambil laporan itu ke pejabat plaintif. Beliau telah ditemani oleh Kong Siew Kan ('Kong'). Menurut Tan, Kong adalah peminjam sebenar. Tan hanya membantu Kong sebagai kawan. Adalah jelas bahawa laporan itu tidak digunakan oleh Tan tetapi oleh Kong. Kemudian, melalui dua surat, plaintif mengesahkan pemberian dua pinjaman berasingan sebanyak RM100,000 setiap satu kepada Kong. Pinjaman-pinjaman tersebut menjadi buruk kerana Kong gagal membuat bayaran. Plaintif kemudian mendapati bahawa nilai pasaran hartanah tersebut hanya RM51,000. Ini mengakibatkan kurangan RM150,620.46 (termasuklah faedah setakat tarikh pemfailan tindakan) yang mana jumlah yang dituntut oleh plaintif dalam writnya terhadap defendan. Hakim perbicaraan yang bijaksana telah memberikan penghakiman berpihak kepada plaintif.

Diputuskan, membenarkan rayuan tersebut:

(1) Meskipun terdapat beberapa ujian yang berguna, indisia atau panduan untuk menentukan sama ada kewajipan berjaga-jaga wujud dalam keadaan yang diberikan, persoalan utama sama ada kewajipan berjaga-jaga perlu dalam suatu kes tertentu adalah suatu yang fakta sensitif (lihat perenggan 10).

(2) Laporan itu tidak dilakukan oleh plainitf. Ia telah dilakukan oleh Tan. Namun beliau bukan peminjam sebenar. Kong adalah peminjam yang sebenar. Tiada keterangan menunjukkan bahawa defendan mengetahui laporan yang ia berikan kepada Tan akan digunakan oleh Kong. Plaintif setelah melihat laporan itu tidak mahukanny kerana ia tidak ditujukan kepada Kong. Tiada keterangan menunjukkan bahawa defendan membenarkan Kong menggunakan laporan itu selepas plaintif menolaknya (lihat perenggan 13).

(3) Tiada andaian tanggungjawab oleh defendan. Syarat-syarat kedekatan dan polisi ketiga-tiga ujian tersebut tidak dipenuhi (lihat perenggan 13).]

Notes

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 945–1013.

Cases referred to

Anns v Merton London Borough Council [1978] AC 728 (refd)
Arab-Malaysian Finance Bhd v Steven Phoa [2003] 1 MLJ 567 (refd)
Bank Bumiputra Malaysia Bhd v Yeoh Ho Huat [1979] 1 MLJ 30 (refd)
Caparo Industries plc v Dickman [1990] 2 AC 605 (refd)
Derry v Peek (1889) 14 App Cas 337 (refd)
Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 (refd)
Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103 (refd)
Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc [2006] UKHL 28 (refd)
Jaswant Singh v Central Electricity Board & Anor [1967] 1 MLJ 272 (refd)
Phelps v Hillingdon [2001] 2 AC 619 (refd)
Smith v Eric S Bush [1990] 1 AC 831 (refd)
Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769 (refd)
Tay Tho Bok v Segar Oil Palm Estate Sdn Bhd [1996] 3 MLJ 181 (refd)
Wagon Mound, The [1961] AC 388 (refd)
Yianni v Edwin Evans & Sons [1982] QB 438 (refd)

Appeal from: Civil Suit No D4–22–724 of 1991 (High Court, Kuala Lumpur)

David Morais (Khabir Dillion with him) (M David Morais) for the appellant.
S Murthi (S Murthi & Associates) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The defendant (appellant before us) is a valuer. It gave a valuation report setting out the estimated value of a piece of property. The report was given to a third party. The plaintiff (respondent before us) says it relied on that report and suffered pure financial loss. It sued the defendant. The High Court found for the plaintiff. The defendant appealed. We allowed the appeal. We dismissed the plaintiff's claim. From our records it does not appear that the matter is going any further. Nevertheless, we think that it is incumbent on us to give written reasons for our decision. First, because, there is a rather interesting point of law here. Second, because we reversed the judge. The parties — especially the plaintiff — and the judge are surely entitled to know why we did that.

[2] The evidence adduced in the court below discloses the following facts. The defendant prepared a valuation report dated 2 January 1985 and addressed it to one Tan Liew Lin who it appears from the record is also known as Tang Lim Lin. I will in the rest of this judgment refer to him simply as 'Tan'. Among others, the report makes the following points. First, that it (the report) was being prepared on the instructions of Tan to advise on 'the present Fair Market Value' of the subject property for — and I quote again from the report — 'financing purpose'. Second, that defendant had inspected the subject property which was a lot of land on which a double storey terrace shop-house was being built with about 70% of the construction complete. Third, that the fair market value of the subject property is

RM408,000. Fourth, it disclaims responsibility to a third party in the absence of the defendant's prior knowledge and consent.

[3] From the evidence it next appears that Tan took the report to the plaintiff's office. He was accompanied by one Kong Siew Kan ('Kong'). According to Tan, it was Kong who was the real borrower. Tan was merely assisting Kong as a friend. At the plaintiff's office the report was handed to an Indian lady who said that the report was wrong because it was not addressed to Kong. From all this it is clear that the report was not being used by Tan but by Kong. Later, by two letters dated 17 October 1985 and 2 April 1986 the plaintiff confirmed the grant of two separate loans of RM100,000 each to Kong. The loans went bad because Kong defaulted. The plaintiff then discovered that the market value of the subject property was only RM51,000. This produced a shortfall of RM150,620.46 (inclusive of interest as at the date of the filing of the action) which sum the plaintiff claimed in its writ against the defendant. After a trial at which viva voce evidence was led, the learned trial judge gave judgment for the plaintiff. And in doing so he was persuaded by the decision in *Yianni v Edwin Evans & Sons* [1982] QB 438.

[4] In *Yianni*, the plaintiffs' wanted to buy a house. It cost £15000. They applied to a building society for a mortgage. The building society engaged the defendants, a firm of valuers to value the house in question. The defendants valued that the house was worth £15,000. It was later discovered that the house had major defects and was worthless or worth far less than £15,000. The plaintiffs claimed damages against the defendants for negligence. The defendants admitted that they had been negligent in preparing the valuation report but denied that they owed a duty of care to the plaintiffs because the plaintiffs' loss was caused by their own negligence in failing to commission an independent survey. Park J who tried the action found for the plaintiffs. He held that the defendants knew that their valuation of the house would be passed on to the plaintiffs, who, in the defendants' reasonable contemplation, would place reliance on its correctness in making their decision to buy the house and mortgage it to the building society. On that basis he held that there was a sufficient relationship of proximity between the parties. And, he ruled against the defence of contributory negligence. This was because the plaintiffs' failure to have an independent survey done was due to their reliance on the defendants' valuation.

[5] In arriving at his conclusions, Park J relied on three authorities. One of these was *Anns v Merton London Borough Council* [1978] AC 728 which he said had decided that —

> the court need only find a situation which gives rise to the proximity test.

[6] However, Lord Bridge in his speech in *Caparo Industries plc v Dickman* [1990] 2 AC 605 expressed views that showed a clear rejection of the *Ann*'s approach. He said:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court

considers it is fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

[7] The current approach to a case where a plaintiff has suffered pure economic loss as a result of the negligent act or omission of a defendant has been stated by Lord Bingham of Cornhill in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28. In a speech read on 21 June 2006, the learned Law Lord said:

> The parties were agreed that the authorities disclose three tests which have been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. The first is whether the defendant assumed responsibility for what he said and did vis-a-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in *Perre v Apand Pty Ltd* [1999] HCA 36, (1999) 198 CLR 180, para 259, succinctly labelled 'policy'). Third is the incremental test, based on the observation of Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481, 60 ALR 1, 59 ALJR 564, approved by Lord Bridge of *Harwich in Caparo Industries plc v Dickman* [1990] 2 AC 605, 618, [1990] 1 All ER 568, [1990] 2 WLR 358, that:
>
> > It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.

[8] Lord Bingham then went on to make five observations of a general nature. These are useful guides to courts across the Commonwealth when deciding how to approach a novel situation in point of imposing a duty of care.

> I content myself at this stage with five general observations. First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration. Hedley Byrne would, but for the express disclaimer, have been such a case. *White v Jones and Henderson v Merrett*, although the relationship was more remote, can be seen as analogous. Thus, like Colman J (whose methodology was commended by Paul Mitchell and Charles Mitchell, *'Negligence Liability for Pure Economic Loss'* (2005) 121 LQR 194, 199), I think it is correct to regard an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further enquiry. If answered negatively, further consideration is called for.
>
> [5] Secondly, however, it is clear that the assumption of responsibility test is to be applied objectively (*Henderson v Merrett*, p 181) and is not answered by consideration of what the Defendant thought or intended. Thus Lord Griffiths said in *Smith v Bush*, p 862, that:
>
> > The phrase 'assumption of responsibility' can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice.'

Lord Oliver of Aylmerton, in *Caparo v Dickman*, p 637, thought 'voluntary assumption of responsibility':

> a convenient phrase but it is clear that it was not intended to be a test for the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted upon. It tells us nothing about the circumstances from which such attribution arises.

In similar vein, Lord Slynn of Hadley in *Phelps v Hillingdon* [2001] 2 AC 619 p 654, observed:

> It is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility. It is, however, clear that the test is an objective one: *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 , 181. The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by law.'
>
> The problem here is, as I see it, that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test.

[6] Thirdly, the threefold test itself provides no straightforward answer to the vexed question whether or not, in a novel situation, a party owes a duty of care. In *Caparo v Dickman,* p 618, Lord Bridge, having set out the ingredients of the threefold test, acknowledged as much:

> But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.

Lord Roskill made the same point in the same case at p 628:

> I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as 'foreseeability', 'proximity', 'neighbourhood, 'just and reasonable', 'fairness', 'voluntary acceptance of risk', or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend

Lord Bridge of Harwich suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty.

[7] Fourthly, I am inclined to agree with the view expressed by the Messrs Mitchell in their article cited above, p 199, that the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. *The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in Caparo v Dickman, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true.*

[8] Fifthly, it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. *But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole*. (Emphasis added.)

[9] In the same case, Lord Hoffmann said:

[35]There is a tendency, which has been remarked upon by many judges, for *phrases like 'proximate', 'fair, just and reasonable' and 'assumption of responsibility' to be used as slogans rather than practical guides to whether a duty should exist or not. These phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance.* For example, in a case in which A provides information to C which he knows will be relied upon by D, it is useful to ask whether A assumed responsibility to D: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465: *Smith v Eric S Bush* [1990] 1 AC 831. Likewise, in a case in which A provides information on behalf of B to C for the purpose of being relied upon by C, it is useful to ask whether A assumed responsibility to C for the information or was only discharging his duty to B: *Williams v Natural Life Health Foods Ltd* [1998] AC 830. Or in a case in which A provided information to B for the purpose of enabling him to make one kind of decision, it may be useful to ask whether he assumed responsibility for its use for a different kind of decision: *Caparo Industries plc v Dickman*[1990] 2 AC 605. *In these cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for one purpose (rather than another)*. The answer does not depend upon what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case. The purpose of the inquiry is to establish whether there was, in relation to the loss in question, the necessary relationship (or 'proximity') between the parties and, as Lord Goff of Chieveley pointed out in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 , 181, the existence of that relationship and the foreseeability of economic loss will make it unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability. In truth, the case is one in which, but for the alleged absence of the necessary relationship, there would be no dispute that a duty to take care existed and the relationship is what makes it fair, just and reasonable to impose the duty.

[36] It is equally true to say that a sufficient relationship will be held to exist when it is fair, just and reasonable to do so. *Because the question of whether a defendant has assumed*

responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case, it is by no means a simple question of fact. Questions of fairness and policy will enter into the decision and it may be more useful to try to identify these questions than simply to bandy terms like 'assumption of responsibility' and 'fair, just and reasonable.' In *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295, 300-303, [1991] 1 All ER 148, [1991] BCLC 178 I tried to identify some of these considerations in order to encourage the evolution of lower-level principles which could be more useful than the high abstractions commonly used in such debates.

[10] In my view, what seems to follow from the speeches of Lords Bingham and Hoffmann on the subject of a negligent misstatement (by act or omission) leading to pure financial loss is this. Whilst there are several useful tests, indicia or guidelines to ascertain whether a duty of care exists in given circumstances, the ultimate question whether a duty of care should be in a particular case is essentially fact sensitive (see *Arab-Malaysian Finance Bhd v Steven Phoa* [2003] 1 MLJ 567 where this court made the same finding.)

[11] One useful guide is to ask the question: was there an assumption of responsibility? So, a finding by the trier of fact that there was, objectively speaking (*Phelps v Hillingdon* [2001] 2 AC 619 at p 654) an assumption of responsibility by a defendant to the plaintiff about the accuracy of his (the defendant's) statement, then, prima facie, a duty of care may be found to exist. Also, for example, if the facts of your case are close to a decided case in which a duty of care was found to exist, the more likely the court will find a duty of care to exist in your case. But, in the same vein, if the facts of your case are further away from a decided case in which a duty of care was found to exist, the more likely the court will find that no duty of care exists in your case.

[12] Counsel on both sides are agreeable that the authority closest to the present facts is *Smith v Eric S Bush* [1990] 1 AC 831 where the facts were these. The plaintiff wanted to buy a house. She approached a building society for a loan. One of the conditions of the loan was that the house should be valued. The building society instructed the defendants, a firm of surveyors to inspect and value the house. But their fees were paid by the plaintiff and the defendants were aware of this. The defendants carried out their inspection negligently. They said that the house was worth £16,500. But it was not. Because the chimneys were not supported and could collapse. They did. The house was badly damaged. The plaintiff would not have purchased the house but for the defendants' valuation report. She had suffered financial loss because of the defendants' negligence. She sued the defendants. The House of Lords found for the plaintiff. There are two important features in that case that I must mention. First, the defendants knew that the survey fee had been *paid by the purchaser*. Second, the defendants knew that the survey report would be relied on *by the purchaser* in order to decide whether or not to purchase the house. If you look at the speeches in the House of Lords you will find that it is the defendants' knowledge turned the balance against them. That is why you find Lord Jauncey of Tullichettle saying this:

In these circumstances they [the defendants] must be taken not only to have assumed contractual obligations towards the building society but delictual obligations towards

A Mrs Smith, whereby they became under a duty towards her to carry out their work with reasonable care and skill. It is critical to this conclusion that the appellants knew that Mrs Smith would be likely to rely on the valuation without obtaining independent advice.

[13] Now look at our facts and compare them with those of *Smith v Eric S Bush*. B Here, the report was not commissioned by the plaintiff. It was commissioned by Tan. But he was not the true buyer. Kong was the true buyer. And there is not a scintilla of evidence to show that the defendant knew the report it gave Tan would be used by Kong. Next, the plaintiff having seen the report did not want it because it was not addressed to Kong. Again, there is not a jot of evidence to show that the defendant permitted Kong to use the report *after* the plaintiff had rejected it. The facts of the C present instance are therefore very far from *Smith v Eric S Bush*. It is therefore a fair to conclude that there had been no assumption of responsibility by the defendant. It is also fair to conclude that the proximity and policy conditions of the threefold test have not been satisfied.

D **[14]** Learned counsel for the plaintiff relied on *Bank Bumiputra Malaysia Bhd v Yeoh Ho Huat* [1979] 1 MLJ 30 in support of his case. In my view his reliance is wholly misplaced. *Bank Bumiputra Malaysia Bhd v Yeoh Ho Huat* was a case in which the defendant surveyor had *fraudulently* valued the subject property for an inflated sum knowing that the plaintiff bank would be relying on his report to lend money E to the borrower. Hence you find Ajaib Singh J saying:

> After giving due consideration to the evidence in this case and the submissions advanced on behalf of the parties I decided in favour of the plaintiffs. An action of deceit will lie at the instance of any person who has acted on the *fraudulent report* of a valuer." (Emphasis added.)

F **[15]** It is trite that negligence is not fraud. The basis of liability in the tort of negligence is the failure to take reasonable care. But the basis of liability in the tort of deceit is either intention or recklessness. See, *Derry v Peek* (1889) 14 App Cas 337. Further, the rule as to remoteness in the tort of negligence is reasonable foreseeability (see *The Wagon Mound* [1961] AC 388; *Jaswant Singh v Central Electricity Board & Anor* [1967] 1 MLJ 272; *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* G [1977] 2 MLJ 103) whereas in deceit it is one of direct consequences. As Lord Denning MR said in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158:

> [I]t does not lie in the mouth of the fraudulent person to say that they [the damage] could not reasonably have been foreseen.

H

[16] All I need add is that *Doyle v Olby* was applied by my learned brother Mohd Ghazali J (as he then was) in *Tay Tho Bok v Segar Oil Palm Estate Sdn Bhd* [1996] 3 MLJ 181 and that the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 approved Lord I Denning's judgment in *Doyle v Olby*.

[17] For the reasons already given, I found myself unable to agree with the judgment of the learned trial judge. The appeal was therefore allowed and those orders made that are usually consequent upon a successful appeal.

[18] My learned brothers, Mohd Ghazali and Zulkefli JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Peter Ling